

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Residential
Building Contractor's License of
Daniel Ivan Petrie, doing business as
Top Notch Builders

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for a hearing before Administrative Law Judge Eric L. Lipman on October 23, 2006, at 9:30 a.m. at the Office of Administrative Hearings in Minneapolis, Minnesota.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared on behalf of the Department of Labor and Industry ("the Department"). Daniel I. Petrie, 17125 Dewes Road, Brainerd, MN 56401 appeared on his own behalf and without counsel ("Respondent"). The hearing record closed at the conclusion of the hearing on October 23, 2006.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the

presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

1. Was Respondent's April 4, 2006 application for a Residential Building Contractor's license materially incomplete, false or misleading such that it constitutes a violation of Minn. Stat. § 326.91, subd. 1(1)?

2. Does the Respondent's 2002 guilty plea to three counts of 3rd Degree Burglary show that he is untrustworthy, financially irresponsible, otherwise incompetent or unqualified to act under a residential building contractor license?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On June 13, 2002, in return for the Hubbard County Attorney's Office agreement to dismiss other pending charges, Respondent Daniel Ivan Petrie agreed to plead guilty to three counts of burglary in the third degree.¹

2. On July 11, 2002, the Honorable John P. Smith of the District Court for Hubbard County accepted Mr. Petrie's guilty plea, and sentenced him to 270 days in jail, payment of fines, surcharges and restitution, and five years of probation.²

3. Today, Mr. Petrie is self-employed and is doing business as Top Notch Builders. He has undertaken renovation, deck and siding work and wishes to become a licensed residential building contractor.³

4. Mr. Petrie has passed the residential building contractor test and paid the required application fee.⁴

¹ Compare, Exhibit 3 at 9 (Exhibit to Rule 15 Petition) with Minn. Stat. 609.582 (3) (2002).

² See, Exhibit 4 at 2-3; accord, Testimony of D. Petrie.

³ See, Exhibit A, B and D.

⁴ See, Exhibit 1 at 1, 5 and 6.

5. Through the spring and summer of 2006, Respondent assembled and filed the various materials that he needed in order to apply for a “Residential Building Contractor or Remodeler License.” Notwithstanding his efforts to submit a conforming application, Respondent completed and filed an outdated version of the application form,⁵ as it had been developed by a predecessor agency, the Department of Commerce.⁶

6. Applicants for a Residential Building Contractor or Remodeler License are required to provide background information as part of the application. The form inquires whether the applicant or the applicant’s qualifying person has “[b]een charged, indicted, pleaded to, or convicted of any criminal offense in any State or Federal Court in the last 10 years,” instructs the applicant to include “felonies, gross misdemeanors or misdemeanors” other than traffic violations, and directs applicants responding “yes” to this question to attach “a written statement, signed and dated by the applicant, explaining the circumstances of each incident.”⁷ Respondent signified that he had been the subject of such a conviction when answering this question – albeit in reply to an earlier version of the question, with a slightly different wording, on the old form.⁸

7. Respondent submitted with his application materials a handwritten note on a lined piece of paper that read “felony – 3rd degree burglary in 2001.”⁹

8. Thomas Sendecky, a senior investigator for the Department, reviewed the application submitted by Respondent. As with all such applications, Mr. Sendecky undertook a criminal background check on the applicant.¹⁰

9. The Department evaluated the criminal complaint and accompanying materials underlying Mr. Petrie’s 2002 conviction to determine if the allegations would affect the application for a residential contractor’s license. The Department considered the three incidents of misconduct by Mr. Petrie, found that the underlying conduct directly related to the occupation of residential contractor, and determined that the guilty plea to felony burglary charges brought

⁵ See, Exhibit 1 at 1; Testimony of D. Petrie; Testimony of T. Sendecky.

⁶ See also, State of Minnesota Department of Administration Reorganization Order No. 193 (April 4, 2005) (“The responsibilities of the Department of Commerce as set forth in Minnesota Statutes 2004, sections 326.83 through 326.992, and Chapter 327A in relation to Residential Contractors and Remodelers are transferred to the Department of Labor and Industry”).

⁷ See, Residential Building Contractor or Remodeler License Application (2006) (Question Number 4) (http://www.doli.state.mn.us/pdf/rbc_buildcontr-remodapplic.pdf).

⁸ See, Exhibit 1 at 2 (Residential Building Contractor or Remodeler License Application - Question Number 4) (“Have you ever been charged with, or convicted of, or been indicted for, or entered a plea to any criminal offense (felony, gross misdemeanor or misdemeanor) other than traffic violations, in any State or Federal Court in the last 10 years?”) (emphasis in original).

⁹ Exhibit 1 at 4.

¹⁰ Testimony of T. Sendecky.

into question the Respondent's fitness to be a residential contractor.¹¹ The Department ultimately concluded that it would not be in the public's interest to issue a license to Mr. Petrie.¹²

10. On September 25, 2006, the Department served by first class mail a combined Order Denying License, Statement of Charges and Notice of Hearing upon Mr. Petrie, thereby initiating this contested case proceeding.¹³

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 45.027, 326.91 and 364.06.

2. Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.¹⁴

4. The burden of proof in this proceeding is on the Respondent to show by a preponderance of the evidence that he should be granted a residential contractor license.

5. The Commissioner of Labor and Industry may deny a license application if the Commissioner finds that it is in the public interest to do so and the applicant either has "violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner,"¹⁵ or the applicant has "engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner."¹⁶ In addition, the Commissioner may deny an application for a

¹¹ *Id.*

¹² *Id.*

¹³ Order Denying License, Statement of Charges and Notice of Hearing.

¹⁴ See, Minn. R. 1400.7300 (5) (2005).

¹⁵ See, Minnesota Statutes § 45.027 (7)(a)(2) (2004).

¹⁶ See, Minnesota Statutes § 45.027 (7)(a) (4) (2004).

residential contractor's license if the applicant "has been shown to be incompetent, untrustworthy, or financially irresponsible."¹⁷

6. Under Minn. Stat. § 364.03, subd. 1, notwithstanding any other statutory provision to the contrary, "no person shall be . . . disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the . . . occupation for which the license is sought."¹⁸

7. In determining whether a conviction directly relates to the occupation for which the license is sought, Minn. Stat. § 364.03, subd. 2, specifies that the licensing authority must consider the following factors:

- (a) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (b) the relationship of the crime or crimes to the purposes of regulating . . . the occupation for which the license is sought;
- (c) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the . . . occupation.

8. The crime of felony burglary for which the Respondent has been convicted directly relates to licensure as a residential building contractor. This conduct is grounds for denial of a license under the relevant statutes in that it constitutes deceptive and dishonest practices and further demonstrates that the Respondent is not sufficiently trustworthy.

9. The Respondent has failed to demonstrate by a preponderance of the evidence that it is appropriate, and in the public's interest, to grant him a residential building contractor license.

10. These Conclusions are reached for the reasons discussed in the Memorandum below, which is hereby incorporated in these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

¹⁷ See, Minnesota Statutes § 326.91 (1)(6) (2004).

¹⁸ See *also*, Minn. Stat. § 364.07 (2004) (the provisions of Minn. Stat. §§ 364.01 to 364.10 "shall prevail over any other laws and rules which purport to govern the . . . denial . . . of a license . . . on the grounds of conviction of a crime or crimes. In deciding to . . . deny . . . a license . . . the . . . licensing authority may consider evidence of conviction of a crime or crimes but only in the same manner and to the same effect as provided for in sections 364.01 to 364.10").

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Minnesota Department of Labor and Industry deny Respondent's application for a residential contractor's license.

Dated: November 20, 2006

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: Tape Recorded (not transcribed); 1 tape

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

In its Statement of Charges and Order for Hearing, the Department asserts that Respondent is not entitled to a residential contractor's license because: (1) Mr. Petrie "provided an incomplete and false application to the Department" and (2) "has demonstrated untrustworthiness and a lack of qualification."

Mr. Petrie does not dispute that he was charged and convicted of felony burglary, but argues that the passage of time since his guilty plea, his payment of restitution, and the fact that he has remained law-abiding since the conviction, make it appropriate to now issue him a residential contractor's license. The Respondent also emphasizes that he truthfully disclosed the conviction on his application and has taken full responsibility for the mistakes he made.

Count I - Claim of Incomplete and False Application:

As to Count I of its Statement of Charges, the Department asserts that because the Respondent did not submit copies of court documents relating to his conviction, as is required by the current version of the Department of Labor and Industry's application form, the application submitted by Mr. Petrie is "incomplete and false."

The claim goes too far. While the Administrative Law Judge agrees that the current application form requires such documentation, and the Department is fully entitled to receive these items before it must pass upon a request for licensure,¹⁹ the record does not provide a basis for concluding that Mr. Petrie's submissions were deliberately false or misleading.

It is significant that the application form completed by Mr. Petrie did not call for the documents that are now requested under the current application form;²⁰ there is no evidence that Mr. Petrie deliberately used the earlier form so as to avoid these disclosures; and Respondent, in his own hand-writing, called the Department's attention to his felony burglary convictions.²¹ Likewise, important, the Department's investigator, Mr. Sendeky, testified persuasively that as a matter of routine he undertakes criminal background checks on license

¹⁹ See, Minn. Stat. § 326.89 (1) (2004) ("An applicant for a license under sections 326.83 to 326.98 must submit an application to the commissioner, under oath, *on a form prescribed by the commissioner*") (emphasis added).

²⁰ Compare, Exhibit 1 at 2, with Residential Building Contractor or Remodeler License Application (2006) (Question Number 4) (http://www.doli.state.mn.us/pdf/rbc_buildcontr-remodapplic.pdf).

²¹ See, Exhibit 1 at 2 and 4.

applicants, such that the lack of specific documentation from Mr. Petrie would not have resulted in the conviction history eluding Sendecky or his team.²²

If there were prejudice to the Department from receipt of an application made on the old forms, which did not include a demand for the documents that are now required, the appropriate course of action would have been for the agency to “refuse” the application under Minn. Stat. § 326.89, subd. 1. Under that statute, the Commissioner is authorized to “refuse to issue a license if the application is not complete or contains unsatisfactory information.”

The difference between “refusing” an unsatisfactory application that “is not complete,” and “denying” an application that is “incomplete and false,” may seem slight, but the distinction is important: The sanction for failing to meet the completeness standard of section 329.89 is a polite refusal from government officials to continue further review of the application. The sanction for failing to meet the completeness standard of section 329.91 can be a hefty monetary penalty.²³

Polite refusals to process the license application should follow from inadvertent and unintentional omissions by applicants – as is the case here. Outright denials and civil penalties, based upon the claims made in the application, should be reserved for those cases where there is evidence that the applicant affirmatively acted to mislead the Department.²⁴ Maintaining this distinction is in the best, long-term interest of would-be applicants and the Department. Count I of the Statement of Charges should be denied.

Count II – Claim of Demonstrated Untrustworthiness and Lack of Qualification:

The Commissioner’s authority to deny a license based upon fraudulent or dishonest behavior is not limited to the criminal conviction record. In its investigation of a license application, the Department may look at the underlying facts that gave rise to the conviction and determine if the actions taken by the Respondent meet the statutory criteria for denial of the license. In this case, the Respondent admitted to the burglaries of three business establishments. The facts are sufficient to support the conclusion that the Respondent engaged in a practice that was deceptive, dishonest, and demonstrated untrustworthiness.

²² Testimony of T. Sendecky.

²³ Compare Minn. Stat. §§ 45.027 (6) and 326.91 (1) (2004).

²⁴ Compare Minn. R. 2891.0400 (2005) (It is a dishonest practice to make a “misrepresentation of material fact by the applicant in obtaining a license”); *In the Matter of the Residential Building Contractor License of Great Lakes Builders and Remodelers, Inc.*, OAH Docket No. 8-1005-11810-2 (1999) (<http://www.oah.state.mn.us/aljBase/100511810.sd.htm>) (applicant affirmatively misled the Department as to his relationship to another business entity); compare also, *In the Matter of the Unlicensed Residential Building Contractor Activity of Joseph Penrose, Individually and doing business as Mainstreet Kitchen and Bath*, OAH Docket No. 7-1005-14143-2 (2001) (<http://www.oah.state.mn.us/aljBase/100514143.drft.htm>) (licensee affirmative misled the Department as to the ownership of the business entity).

The facts are likewise sufficient to support the conclusion that the underlying conduct in which Mr. Petrie engaged directly relates to the occupation of a residential contractor. As detailed in the testimony of the Department's investigator, Mr. Sendeky, licensed residential building contractors have unfettered access to the homes of consumer clients and many opportunities to misappropriate property. Minnesota's license application process protects consumers from potentially unscrupulous contractors, and is in the public interest.

With that said, Minn. Stat. § 364.03, subd. 3, specifies that even if a person has been convicted of a crime that directly relates to the occupation for which a license is sought, the person shall not be disqualified if he or she can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the occupation. The Department argues that Chapter 364 is inapplicable here because Minn. Stat. § 45.027, subd. 10, does not apply to an applicant where the underlying conduct on which the conviction is based would be grounds for denial of the license.

While it is true that more than four years has elapsed since Mr. Petrie was convicted, and that he wishes to move in a different and more productive direction, the Administrative Law Judge agrees with the Department that Mr. Petrie's earlier misconduct relates to his fitness for a residential building contractor license. The nature and seriousness of the crimes for which he was convicted, the circumstances relating to those crimes, and the fact that he continues to be under court supervision for his earlier misconduct,²⁵ all provide reasonable support for denial of the license application.²⁶ Respondent has not provided sufficient evidence of his present fitness to justify full and unrestricted licensure.

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²⁵ Compare Minn. Stat. § 364.03 (3)(c) (2004) (among the minimum elements for a showing of "sufficient rehabilitation" under the statute is a discharge from probation).

²⁶ Following the introduction of letters of reference in support of Respondent's trustworthiness and capabilities as a contractor (see, Exhibits A through D), the Department asserted an additional ground for relief – namely that Mr. Petrie was unlawfully working as a contractor in two or more "special skill" trades, and presumably, not entitled to a license under Minn. Stat. § 326.91, subd. 5 (2004). Compare also, Minn. Stat. §§ 326.83, subds. 15 and 19 (2004). While Mr. Petrie's admissions seem particularly damning, the Administrative Law Judge concludes that the hearing record is simply insufficient to make findings of fact as to the nature of the completed work or the claimed violation. Further, because the agency is otherwise entitled to deny the application on the basis of the charges in Count II, the ALJ did not reach the merits of the agency's alternate claim for relief.